

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI  
JACKSON DIVISION**

JAMES D. JOHNSON, as next friend to  
Olivia Y., et al.

PLAINTIFFS

vs.

CIVIL ACTION NO. 3:04cv251LN

HALEY BARBOUR, as Governor of the  
State of Mississippi, et al.

DEFENDANTS

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**DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR  
SUMMARY JUDGMENT ON LIABILITY**

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COME NOW, Haley Barbour, as Governor of the State of Mississippi, Donald Taylor, as Executive Director of the Mississippi Department of Human Services ("MDHS"), and Rickie Felder, as Director of the Division of Family and Children's Services ("DFCS") ("Defendants"), by their attorneys of record, and submit their Response in Opposition to Plaintiffs' Motion for Summary Judgment on Liability.

**I. Statement of Law**

1. "Plaintiffs who have been involuntarily placed in the custody of the DHS have substantive due process rights under the fourteenth amendment to be free from harm while in state custody. Thus, Defendants have an affirmative duty to provide the Plaintiffs with *adequate* food, shelter, clothing, medical care and reasonable safety under *DeShaney* [v. Winnebago County Dept. of Social Servs., 489 U.S. 189 (1989)]. Defendants are not required under the Constitution to provide Plaintiffs with an *optimal* level of care and treatment." *E.F. v. Scafidi*, No. 3:91CV591LN, at 20 (S.D. Miss. March 13, 1996) (Dist. File) (quoting *Baby Neal v. Casey*,

821 F. Supp. 320, 327 (E.D. Pa. 1993)) (emphasis added), attached as Exhibit “J” to Defendants’ Motion for Summary Judgment.

2. The standard by which Defendants’ performance of their constitutional duty to provide reasonably safe living conditions and basic necessities to foster children is the deliberate indifference standard. “To demonstrate a viable substantive due process claim, in cases involving government action, the plaintiff must show that the state acted in a manner that ‘shocks the conscience.’” *Hernandez ex rel. Hernandez v. Texas Dep’t of Protective Servs.*, 380 F.3d at 872, 880 (5th Cir. 2004) (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998)).

3. “[N]amed plaintiffs who represent a class ‘must allege and *show* that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent’.” *Lewis v. Casey*, 518 U.S. 343, 357 (1996) (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 40, n.20 (1976) (quoting *Warth v. Seldin*, 422 U.S. 490, 502 (1975))) (emphasis added); *see also Brown v. Protective Life Ins. Co.*, 353 F.3d 405, 407 (5th Cir. 2003).

## **II. Statement of Facts**

4. While in the custody of the State of Mississippi, the named Plaintiffs have been provided adequate care, consisting of food, clothing, shelter, and medical care, and safe keeping. (See Affidavits of MDHS Area Social Work Supervisors Deborah Stewart, Queen Coleman, Brenda Coe, and Earnest Johnson, respectively attached as Exhibits “T,” “FF,” “GG,” and “HH,” to Defendants’ Motion for Summary Judgment. *See also* Affidavits of Regional Directors for the seven MDHS regions: Martha McDaniel, Maggie Mixon, Terry Phillips, Tracy Malone, John Webb O’Bryant, Sylvia Sessions, Michelle Henry, and Zadie Rogers, respectively attached as

Exhibits “M,” “N,” “W,” “X,” “Y,” “Z,” “AA,” and “BB,” to Defendants’ Motion for Summary Judgment.

5. Dr. Marva Lewis, who is Plaintiffs’ designated case record expert for the named Plaintiffs, testified that Cody B., Olivia Y., and Jamison J. have been provided basic necessities such as shelter, food, and clothing. *See* Excerpts of the deposition of Marva Lewis, attached as Exhibit “O” to Defendants’ Motion for Summary Judgment, at 62:9-63:18, 63:25-64:7, 65:21-67:6,.

6. Dr. Wood Hiatt, who is the Plaintiffs’ designated expert psychiatrist that interviewed the named Plaintiff, John A., testified that John A. was adequately clothed, well-fed, and well-nourished. *See* Excerpts of the deposition of Wood Hiatt, attached as Exhibit “BBB” to Defendants’ Motion for Summary Judgment, at 88:1-6.

7. The named Plaintiffs have also been provided adequate medical care. *See generally* Summaries of medical, mental health, and dental services proved to named Plaintiffs, attached as Exhibits “A,” “B,” “C,” “D,” “E,” “F,” “G,” and “H” to Defendants’ Motion for Summary Judgment.

8. Defendants have not been deliberately indifferent, and their actions have been reasonable. *See* Excerpts of the deposition of Sue Steib, attached as Exhibit “OO” to Defendants’ Motion for Summary Judgment, at 196:4-197:1.

### **III. Exhibits in Support of Response**

In support of Defendants’ Response in Opposition to Plaintiffs’ Motion for Summary Judgment on Liability, Defendants offer the following exhibits:

#### **1. Exhibits Attached to Defendants’ Motion for Summary Judgment**

Exhibit A: Medical and dental services provided to Olivia Y.

Exhibit B: Mental health, medical, and dental services provided to Jamison J.

Exhibit C: Mental health, medical, and dental services provided to Cody B.  
 Exhibit D: Mental health, medical, and dental services provided to John A.  
 Exhibit E: Mental health, medical, and dental services provided to Mary W.  
 Exhibit F: Mental health, medical, and dental services provided to Tom W.  
 Exhibit G: Mental health, medical, and dental services provided to Matthew W.  
 Exhibit H: Mental health, medical, and dental services provided to Dana W.  
 Exhibit J: *E.F. v. Scafidi*, No. 3:91CV591LN (S.D. Miss. Mar. 13, 1996) (Dist. File)  
 Exhibit K: FY 2006 Joint Legislative Budget Committee Hearing Transcript  
 Exhibit M: Affidavit of Martha McDaniel  
 Exhibit N: Affidavit of Maggie Mixon  
 Exhibit O: Excerpts of the deposition of Marva Lewis  
 Exhibit P: Excerpts of the deposition of Peg Hess  
 Exhibit Q: Case Reviews of Four Individual Children by Marva L. Lewis, Ph.D.  
 Exhibit R: Excerpts of the deposition of Cathy Crabtree  
 Exhibit S: Excerpts of the deposition of Dr. Wood Hiatt  
 Exhibit T: Affidavit of Deborah Stewart  
 Exhibit U: Excerpts of the deposition of Deborah Stewart  
 Exhibit V: Bulletin 7500  
 Exhibit W: Affidavit of Terry Phillips  
 Exhibit X: Affidavit of Tracy Malone  
 Exhibit Y: Affidavit of John Webb O'Bryant  
 Exhibit Z: Affidavit Sylvia Sessions  
 Exhibit AA: Affidavit of Michelle Henry  
 Exhibit BB: Affidavit of Zadie Rogers  
 Exhibit DD: Custody, but No Care: A Review of Children's Experiences in MDHS  
 Custody by Peg Hess, Ph.D.  
 Exhibit EE: "Beyond Danger!" A Management Review of the Mississippi Department  
 of Human Services Division of Family and Children's Services  
 (MDHS/DFCS) by Cathy Crabtree  
 Exhibit FF: Affidavit of Queen Coleman  
 Exhibit GG: Affidavit of Brenda Coe  
 Exhibit HH: Affidavit of Earnest Johnson  
 Exhibit JJ: Affidavit of Vicky Donaho  
 Exhibit LL: Selected Supportive Services provided for named Plaintiffs  
 Exhibit MM: DHS 132575  
 Exhibit NN: Systems Review of the Mississippi Department of Human Services,  
 Division of Family and Children's Services, Final Report by CWLA  
 Exhibit OO: Excerpts of the deposition of Sue Steib  
 Exhibit TT: Excerpts of the deposition of Peter Boulette  
 Exhibit UU: 2007 MDHS Budget Request for DFCS  
 Exhibit YY: Excerpts of the deposition of Donald Taylor  
 Exhibit BBB: Excerpts of the deposition of Wood Hiatt  
 Exhibit EEE: 2006 MDHS Budget Report for DFCS  
 Exhibit FFF: Expert Report of Bill M. Brister, Ph.D.  
 Exhibit GGG: HB 1576

**2. Exhibits Attached to Defendants' Response In Opposition to Plaintiffs' Motion for Summary Judgment**

Exhibit JJJ: Excerpts of the deposition of Sue Steib  
Exhibit KKK: Youth Today article titled, "*13 Lawsuits That Reformed (or Drained) Child Welfare*"  
Exhibit LLL: Mississippi Supreme Court order establishing a Commission on Children's Justice  
Exhibit MMM: Excerpts of the Deposition of Wood Hiatt

**3. Exhibits Attached to Plaintiffs' Motion for Summary Judgment on Liability**

Exhibit 14: Final Report – Mississippi Child and Family Services Review – May 2004

For the above reasons and the reasons set forth more fully in Defendants' Memorandum of Authorities in Support of Their Response in Opposition to Plaintiffs' Motion for Summary Judgment on Liability, which is incorporated herein by reference, the Plaintiffs' Motion for Summary Judgment on Liability should be denied, and the Defendants' Motion for Summary Judgment should be granted.

This, the **18th** day of **May, 2006**.

Respectfully Submitted,

**HALEY BARBOUR, as Governor of the State of Mississippi; DONALD TAYLOR, as Executive Director of the Department of Human Services; and RICKIE FELDER as Director of the Division of Family and Children's Services**

BY: /s/ Dewitt L. ("Rusty") Fortenberry, Jr.

**OF COUNSEL:**

Attorney General Jim Hood  
State of Mississippi  
P.O. Box 220  
Jackson, MS 39205-0220

**BAKER, DONELSON, BEARMAN, CALDWELL & BERKOWITZ, PC**  
Dewitt L. ("Rusty") Fortenberry, Jr. (MSB #5435)  
Gretchen L. Zmitrovich (MSB #101470)  
Ashley Tullos Young (MSB #101839)

Kenya Key Rachal (MSB #99227)  
4268 I-55 North  
Meadowbrook Office Park  
Jackson, Mississippi 39211  
Telephone: (601) 351-2400  
Facsimile: (601) 351-2424

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day electronically filed the foregoing with the Clerk of the Court using the ECF system which sent notification of such filing to the following:

W. Wayne Drinkwater, Jr. Esq.  
Melody McAnally, Esq.  
BRADLEY ARANT ROSE & WHITE LLP  
Suite 450, One Jackson Place  
Post Office Box 1789  
Jackson, MS 39215

Stephen H. Leech, Esq.  
850 East River Place, Suite 300  
Jackson, Mississippi 39215

Eric E. Thompson, Esq.  
CHILDREN'S RIGHTS, INC.  
330 Seventh Avenue, 4<sup>th</sup> Floor  
New York, New York 10001

Harold E. Pizzetta, III  
Special Assistant Attorney General  
OFFICE OF THE ATTORNEY GENERAL  
P.O. Box 220  
Jackson, MS 39205

I also certify that I have this day served a copy of the foregoing on the following non-ECF participants by United States Mail, postage prepaid:

Marcia Robinson Lowry, Esq.  
Susan Lambiase, Esq.  
Shirim Nothenberg  
Tara Crean, Esq.  
CHILDREN'S RIGHTS, INC.  
330 Seventh Avenue, 4<sup>th</sup> Floor  
New York, New York 10001

Eric S. Manne, Esq.  
John Piskora, Esq.  
LOEB & LOEB, LLP  
345 Park Avenue  
New York, NY 10154

**SO CERTIFIED**, this the **18th** day of **May**, **2006**.

/s/ Dewitt L. ("Rusty") Fortenberry, Jr.